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GOLDEN

DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

2/150

FILE: B-203419.4

DATE: March 16, 1982

MATTER OF: Biospherics, Inc.--Reconsideration

DIGEST:

1. Decision initially rendered in response to expressed interest from court will be reconsidered at request of protester where litigation was dismissed without prejudice and the protest and reconsideration request were timely filed.
2. Where protester has not presented any additional facts or legal arguments which show that earlier decision was erroneous, but merely disagrees with the conclusions, protester has not presented basis to reverse prior decision.
3. Allegation that contracting officer failed to consider information submitted by protester concerning awardee's responsibility, even if true, does not indicate fraud on the part of the procuring official where record shows that contracting agency asked awardee to resolve doubts concerning responsibility and awardee furnished information satisfying the contracting agency that the awardee was responsible.
4. Absent a finding of nonresponsibility, a below-cost offer provides no reason to challenge an award.

Biospherics, Inc. (Biospherics), requests reconsideration of our decision denying Biospherics' protest in Biospherics, Inc., B-203419, December 31, 1981, 81-2 CPD 518.

The decision was rendered in response to an expression of interest from the Superior Court of the District of Columbia in connection with Civil Action No. 17577-81. The court refused to issue a temporary

restraining order and a hearing on Biospherics' request for a preliminary injunction was scheduled for January 25, 1982.

Biospherics' request for reconsideration of our decision was filed with our Office initially on January 12, 1981. Since our decision was issued in response to the court's request and the court had expressed no interest in reconsidering the decision, we declined to reconsider the decision. Biospherics, Inc.--Request for Reconsideration, B-203419.3, January 22, 1982, 82-1 CPD \_\_\_\_.

Biospherics now advises that the District of Columbia corporation counsel and the Biospherics' attorney petitioned the court on January 18, 1982, to dismiss the case without prejudice so that Biospherics could pursue the matter with our Office, and that the court is no longer involved in the case. Although it is the policy of our Office not to consider matters which are before a court of competent jurisdiction or have been decided on the merits by the court, we will consider a matter which has been dismissed without prejudice where the protest and reconsideration request were timely filed. Peter Gordon Company, Inc., B-196370, July 18, 1980, 80-2 CPD 45. Cf. Megapulse, Inc.--Reconsideration, B-194986, May 21, 1980, 80-1 CPD 350.

Biospherics protested the award of a contract to Lapteff Associates (Lapteff) by the District of Columbia (D.C.) under solicitation No. 0149-AA-0-1-RJ, a two-step, formally advertised procurement for laboratory services at the Blue Plains Wastewater Treatment Facility. Biospherics objected to D.C.'s determination to postpone evaluation of certain information concerning an offeror's ability to perform the required work until the second step, price competition, had been completed. Biospherics asserted alternatively that the competing offerors should be determined nonresponsive.

We held that D.C. could properly delete by amendment the requirement for information which was to be used in evaluating proposals during step one of the two-step procurement and consider these factors under its responsibility determination with respect to the awardee, since (1) the revised requirements reflected the agency's actual needs and (2) there was no showing that the interests of offerors or potential offerors were unfairly prejudiced

by the amendment. We also rejected Biospherics' allegation that the amendment left nothing to evaluate in step one, citing requirements for data and documentation which remained under step one. We denied the protester's contention that D.C.'s amendment had created definitive responsibility criteria. We found that the criteria did not constitute definitive responsibility criteria because the information requested by amendment was general in nature and not sufficiently specific and objective.

Furthermore, we stated that a technical staff member's determination, under the original evaluation criteria of step one, that Lapteff and another offeror were technically not acceptable, had no bearing on the contracting officer's subsequent determination that Lapteff was responsible under the revised solicitation. We noted that the record indicated that Lapteff convinced the contracting officer that it could perform the work satisfactorily.

Biospherics argues that we concluded erroneously that substantive evaluation criteria remained in step one. Biospherics also contends that the responsibility criteria in step two are definitive and that D.C. ignored these criteria in its responsibility evaluation.

In our view, Biospherics' contentions that nothing was left for evaluation under step one and that the criteria contained in the amendment were definitive responsibility criteria were fully considered in the original decision and rejected. While Biospherics disagrees with our conclusions on these issues, it essentially reargues these issues in its request for reconsideration. Disagreement with our prior decision does not provide a basis to reverse our decision, and Biospherics has provided no legal or factual basis for its allegations that our conclusions were erroneous. Pascual Maggio--Reconsideration, B-203461.2, September 28, 1981, 81-2 CPD 253.

Biospherics has also questioned D.C.'s determination that Lapteff is a responsible contractor. It contends that D.C. memoranda support its view that Lapteff cannot perform the work. However, as noted in our decision, the memoranda relate to an evaluation done under the unrevised solicitation which has no effect on the subsequent responsibility determination.

In any event, as noted in our decision, we do not review affirmative determinations of responsibility absent

a showing of fraud on the part of procuring officials or of the agency's failure to apply definitive responsibility criteria.

We previously ruled that this solicitation did not include definitive responsibility criteria. Biospherics contends that D.C.'s decision that Lapteff is responsible involves fraud on the part of procuring officials and asks that we review that decision. In this connection, the protester alleges that Lapteff knowingly falsified critical information in its proposal, that is, the protester's investigation shows that Lapteff does not have the staff required for the job and has falsely advised D.C. to the contrary. The protester alleges that it advised the D.C. contracting officer of this misstatement and submitted evidence to support the allegation, and the contracting officer failed to act on the information.

Biospherics specifically contends that the D.C. contracting officer failed to act on information contained in a Dun and Bradstreet (D&B) report on Lapteff sent to the contracting officer by Biospherics and ignored the extensive comments by D.C.'s technical review team under the original unamended step-one evaluation criteria. According to Biospherics, both of these sources of information demonstrated that Lapteff lacked required personnel, facilities and experience. Biospherics asserts that the contracting officer's decision to award to Lapteff in light of this information which showed Lapteff was nonresponsible constituted fraud on the part of the procuring official.

Initially, we note, as we stated in our prior decision, that the technical staff determination that Lapteff was technically unacceptable under the original evaluation has no bearing on the contracting officer's subsequent determination that Lapteff was responsible under the revised solicitation. The technical evaluation was approximately 8 months earlier under the unrevised solicitation and the record indicates Lapteff had improved its facilities, equipment and staffing capability in the interim.

In view of the allegation of fraud, we requested that D.C. submit the information upon which Lapteff was determined responsible. We did not furnish the information to Biospherics since the submission contained confidential business documents. The documentation provided

includes the D&B report. As noted by the contracting officer, the report, dated December 15, 1981, states that the history provided in the D&B report is "incomplete." Furthermore, the D&B report also includes a statement that D&B "does not guarantee the accuracy, completeness or timeliness of the information provided \* \* \*." The same disclaimer is contained in the January 7, 1982, D&B report submitted by Biospherics to this Office. Thus, we find no basis to conclude that the contracting officer failed to act in a proper manner concerning the information in the D&B report.

The record also indicates that D.C. requested supplemental information from Lapteff to resolve D.C.'s doubts concerning Lapteff's responsibility. D.C. expressed many of the same concerns raised by Biospherics based on the D&B report and the earlier technical staff review relating to Lapteff's productive capacity, including financial capacity, sufficiency of space to conduct off-site services and adequacy of staffing. Lapteff's response addressed D.C.'s concerns. For example, Lapteff provided a confidential financial statement, which cast doubt on the accuracy of the D&B report of Lapteff's finances. Lapteff also provided evidence of its access to additional space if needed to perform the contract and a list of 13 laboratory technicians who would be available to Lapteff if the firm received the contract. Lapteff stated throughout its responsibility discussions with D.C. that it had adequate staffing including the ability to select from 23 employees working on other Lapteff contracts and that it had 30 employment applications on file.

Finally, contrary to Biospheric's assertion that the contracting officer ignored the opinion of the technical staff, the record contains a memorandum to the contracting officer from a member of the technical staff with the Bureau of Wastewater Treatment (BWT), D.C. Department of Environmental Services, which oversees the operation of the treatment plant, recommending award to Lapteff based on BWT's review of Lapteff's submissions and on oral discussions held with Lapteff concerning Lapteff's ability to perform the services. Thus, BWT's technical review of Lapteff's ability to perform the contract after step two showed that Lapteff had remedied many of the concerns raised by the technical review under the original evaluation criteria of step one.

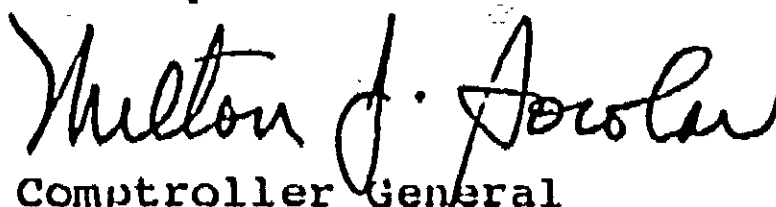
Accordingly, in our view, based on this record, Biospherics has not demonstrated fraud on the part of the

procuring official or that the contracting officer's decision that Lapteff was responsible was unreasonable.

Biospherics also suggests that Lapteff's costs for the work are far below a 1979 D.C. work estimate and, therefore, questions Lapteff's ability to perform at the price offered.

Absent a finding of nonresponsibility, a below-cost or "buy-in" proposal provides no reason to challenge an award. Bob McDorman Chevrolet, Inc. and Jack Roach Cadillac, B-200846, B-200847, B-200847.2, B-200848, March 13, 1981, 81-1 CPD 194. Further, whether Lapteff performs the contract in accordance with the specifications is a matter of contract administration which is the responsibility of the contracting agency, not GAO. J & J Maintenance, Inc.--Reconsideration, B-201484.3, December 21, 1981, 81-2 CPD 482; Lite Industries, Inc., B-200646, January 30, 1981, 81-1 CPD 55.

We affirm the decision of December 31, 1981.

*for*   
Comptroller General  
of the United States